Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

THOMAS J. DILLON,

Petitioner,

v.

ARTHUR BEELER, Warden FMC, Lexington,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a District Court in the State of Petitioner's federal confinement has concurrent jurisdiction to issue a writ of habeas corpus arising from an interstate detainer filed by a demanding State outside the territorial boundaries of the District Court's State, or should such habeas petitions be transferred in the interests of justice and judicial efficiency to a District Court in the demanding State?

II. Whether a petition for a writ of habeas corpus is moot when a simple change in the status of the Petitioner's custody does not affect the nature of the habeas relief sought by the Petitioner, specifically, that a pending State indictment should be dismissed for violation of the Interstate Agreement on Detainers and for denial of the Petitioner's constitutional speedy trial rights?

LIST OF ALL PARTIES TO THE PROCEEDING

The following is a list of all parties to the proceeding in the United States Court of Appeals for the Sixth Circuit whose judgment is sought to be reviewed in this case:

Arthur Beeler
Thomas J. Dillon

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PETITION FOR WRIT OF CERTIORARI

This is a Petition for a Writ of Certiorari pursuant to Rule 10(a), United States Supreme Court Rules, to review the final order of the United States Court of Appeals for the Sixth Circuit dismissing an appeal from the order of the United States District Court for the Eastern District of Kentucky denying the petition of Thomas J. Dillon (Petitioner) for a writ of habeas corpus under 28 U.S.C. § 2241. This case arose from the lodging of a detainer by the State of Tennessee against the Petitioner, who was at the time of the filing of the petition for a writ of habeas corpus in the custody of the United States at Lexington, Kentucky, pursuant to the Interstate Agreement on Detainers (IAD), 18 U.S.C. Appendix 2.[1]

I. OPINIONS AND ORDERS OF THE LOWER COURTS ENTERED IN THIS CASE

The following orders and opinions rendered by the courts in this case are reproduced in the Appendix to this Petition.

A. STATE COURTS

1. The Knox County Criminal Court, 6th Judicial District of Tennessee, Order dismissing the indictment, dated May 17, 1991 is unreported and has been reproduced in the Appendix at pp. 10a-11a.

2. The Supreme Court of Tennessee, Opinion partially affirming and partially modifying decision of Tennessee Court of Criminal Appeals, reported as *Dillon v. State*, 844 S.W.2d 139 (Tenn. 1992).

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[1] The IAD has been adopted by the State of Tennessee and is codified at T.C.A. § 40-31-101, et seq. All references will be to the federal codification.

B. FEDERAL COURTS

1. The United States District Court for the Eastern District of Kentucky, Opinion and Judgment denying Petitioner's Petition for a writ of habeas corpus, dated August 29, 1997 is unreported and reproduced in the Appendix at pp. 3a-7a.

2. The United States Court of Appeals for the Sixth Circuit:

a. Order Dismissing Appeal as Moot, dated March 24, 1998 is unreported and reproduced in the Appendix at pp. 1a-2a.

b. Order Denying Petitioner's Motion to Rehear, dated April 27, 1998 is unreported and reproduced in the Appendix at pp. 8a-9a.

II. JURISDICTION OF SUPREME COURT

A. Timeliness of Petition

The Order of the United States Court of Appeals for the Sixth Circuit dismissing the Petitioner's appeal as moot was entered on March 24, 1998. The Order of the United States Court of Appeals for the Sixth Circuit denying the Petitioner's Motion for a Rehearing was entered on April 27, 1998.

This Petition for a Writ of Certiorari was filed on 1998.

B. Statutory Jurisdiction of the Supreme Court

This Petition for a Writ of Certiorari is filed pursuant to Rule 10(a), Supreme Court Rules. The statutory provisions conferring jurisdiction on the United States Supreme Court to review the judgment in this case on a Writ of Certiorari are 28 U.S.C. §§ 1254(1) and 2101(c). Additionally, jurisdiction of the Justices of United States Supreme Court to issue a writ of habeas corpus is conferred by 28 U.S.C. §§ 2241(a) and 2254(a).

III. RELEVANT PROVISIONS OF LAW

The complete texts of the following provisions of law on which the Petitioner relies in this case are:

Constitution of the United States, Amendments VI and XIV; 28 U.S.C. § 1404 and 28 U.S.C. § 1631; 28 U.S.C. § 2241; 28 U.S.C. § 2243; 28 U.S.C. § 2252; 28 U.S.C. § 2254; and Interstate Agreement on Detainers, 18 U.S.C., Appendix 2.

IV. STATEMENT OF THE CASE AND FACTS

A. United States District Court for the Eastern District of Kentucky

On March 8, 1996, the Petitioner filed his Petition for a writ of Habeas Corpus, naming his immediate federal custodian as Respondent and alleging that he was a federal prisoner at Lexington, FMC. (Petition for Habeas Corpus, ¶ 1) The Petitioner alleged that on May 17, 1991, an order was entered in the Knox County Criminal Court of the State of Tennessee dismissing an indictment for failure to try the Petitioner within 120 days of his arrival in Tennessee in violation of the IAD. The Tennessee trial court made findings that noncompliance with the continuance provisions of the IAD had occurred when a continuance had been ordered without a hearing or a showing of good cause. (*Id.*, ¶¶ 2-4)[2] Appeals were taken through the Tennessee Supreme Court, which reversed the judgment of the trial court. (*Id.*, at ¶¶ 5-7) The Petitioner thus is in custody and subject to the order of a State court within the meaning of federal habeas corpus statutes. (*Id.*, at ¶¶ 8-9) In his habeas petition, the Petitioner sought dismissal of the pending State indictment. (Memorandum of Law, at pp. 9-10)

In response to this habeas petition, the Respondent filed a motion to dismiss on May 15, 1996, which was

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[2] Included in the Appendix at 18a-35a is the transcript of the hearing held in the Tennessee trial court.

docketed by order of the District Court as the Respondent's Response. (Respondent's Motion to Dismiss) The Respondent admitted that the Petitioner was in federal custody and subject to a detainer as a result of an indictment in the State of Tennessee. (*Id.*, at p. 1) Among other asserted defenses, the Respondent denied that the District Court had subject matter jurisdiction. (*Id.*, at pp. 3-4, 9-10)

On May 22, 1996, the Petitioner filed an amendment to his Petition for a Writ of Habeas Corpus, further elaborating on violations of the IAD. (Amended Petition, at pp. 1-5) The Amended Petition also went on to allege that the Petitioner had been denied his constitutional right to a speedy trial as a result of the conduct of the State of Tennessee, causing the loss of crucial exculpatory evidence. (*Id.*, at pp. 5-7) The Petitioner contested the Respondent's defenses (*Id.*, at p. 6) and stated that, as a consequence of the pending detainer, the Petitioner had suffered specified detrimental effects during his federal incarceration. (*Id.*, at p. 6) Supporting documents were attached to this Amended Petition. The trial court further construed the Petitioner's Supplemental Memorandum in Support of the Petition, filed on May 22, 1996, as an Amended Petition. (Order dated May 29, 1996, at p. 1)

On July 1, 1996, the Respondent filed his Response to the Amended Petition, continuing to deny that the trial court had jurisdiction. (Response to Amended Petition, at pp. 2-13) In the context of this on-going jurisdictional dispute in the District Court, the Petitioner filed his Response to the Surreply of the United States to the Amended Petition for Habeas Corpus Relief on August 23, 1996; he specifically invoked the procedure found in 28 U.S.C. § 2252, which provides for notification of State officers having custody of a habeas petitioner in the manner directed by the District Court. (Response to Surreply, at pp. 5-6)

The petition was referred to a Magistrate Judge for a report and recommendation, which was filed on June 10, 1997, and essentially adopted the factual summary of the

Tennessee Supreme Court in *Dillon v. State*, (Report and Recommendation, at pp. 1-4) Concluding that a disputed issue of fact existed as to why the Petitioner had not been brought to trial following the decision of the Tennessee Supreme Court, the Report and Recommendation acknowledged that the Petitioner had always sought a speedy trial. (*Id.*, at pp. 4-5) Without holding an evidentiary hearing on the identified disputed issues of fact presented on the face of the record, the Magistrate Judge recommended that the District Court dismiss the petition for a writ of habeas corpus, as amended. (*Id.*, at pp. 8-9)

The Petitioner duly filed his objections to the Report and Recommendation on June 17, 1997. On August 29, 1997, the District Court entered its Opinion and Order overruling the Petitioner's objections and adopting the Report and Recommendation. (Opinion and Order, at pp. 1-2) The judgment of the District Court was entered accordingly on the same date, together with a certificate of probable cause. (Judgment, at p. 1)

On September 5, 1997, the Petitioner timely filed his Notice of Appeal.

B. United States Court of Appeals for the Sixth Circuit

In conformity with Rule 3, Fed. R. App. P., the Petitioner appealed from the final decision of a District Court pursuant to 28 U.S.C. § 1291. Additionally, "[i]n a habeas corpus proceeding . . . the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had." 28 U.S.C. § 2253. *See also* Rule 22, Fed. R. App. P.

In its Order of March 24, 1998, the Sixth Circuit stated that the Respondent had released the Petitioner from federal prison without turning the Petitioner over to

Tennessee authorities. (Sixth Circuit Order, at p. 1)[3] Despite Petitioner's constitutional and statutory habeas claims regarding denial of a speedy trial, the Court reasoned that the pending Tennessee indictment on which the detainer had been premised was not a sufficient grounds or collateral consequence to prevent the case from becoming moot. (*Id.*) Moreover, the Court stated that a federal court does not possess the power to dismiss an indictment for a State violation of the IAD. (*Id.*, at p. 2) Because the State was not before the Court, the Sixth Circuit found that the Court lacked jurisdiction to issue a writ even if the Court had the authority to do so. (*Id.*)

C. Tennessee State Court Proceedings

In its opinion, the Supreme Court of Tennessee recited the essential facts. *Dillon v. State, supra,* 844 S.W.2d at 140-141. Prior to December 11, 1990, the Petitioner was a federal prisoner at a federal facility in Jesup, Georgia, when he was transferred from the Jesup facility to the Knox County Jail in Knoxville, Tennessee, pursuant to the IAD as a result of a detainer filed by the State of Tennessee. On December 11, 1990, the Petitioner was brought to the State of Tennessee and arraigned on December 14, 1990, on a State presentment in Knoxville, Tennessee. The Petitioner at that time and ever since has demanded a speedy trial under the IAD. On the date initially set for trial, February 11, 1991, the State moved for and was granted a continuance because it was not prepared to go to trial. In addition, the Petitioner's motion to suppress certain evidence was granted. On the State's motion, the trial date was then reset for April 1, 1991.

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[3] The Court of Appeals failed to state all relevant facts in its Order. The Petitioner was enlarged under a bond to the State of Tennessee at the time of his release from federal custody and thus was effectively released to the custody of the State of Tennessee at that time.

On March 5, 1991, an order was entered by the State trial court to allow the State to pursue an interlocutory appeal of the order to suppress. The following day, March 6, 1991, by the State's ex parte and pro forma motion, without notice to the Petitioner or his counsel or a hearing in open court with contemporaneous findings of just cause and reasonable necessity or explaining any disability of the Petitioner to stand trial, the trial court entered an order purporting to continue the trial from the April 1, 1991, date.

On April 22, 1991 (132 days from the date the Petitioner was brought to Tennessee), the Petitioner filed a motion to dismiss the indictment with prejudice for noncompliance with the mandatory IAD provisions as to granting continuances. After a May 2nd hearing in the State trial court, on May 17, 1991, the trial court entered its order dismissing the State's indictment with prejudice for violation of the speedy trial provisions of the IAD. The trial court expressly found that the applicable provisions of the IAD had been violated and that the limitations period had not been properly tolled. No finding was ever made that the Petitioner was unable to stand trial and no demonstration was made by the State of either just cause or the reasonable necessity of the continuance of the case.

On May 20, 1991, the State appealed the dismissal; the Petitioner's return to federal custody was stayed by the Tennessee Court of Criminal Appeals. Subsequently, following a decision of the State Court of Criminal Appeals on October 10, 1991, the Petitioner's State case reached the Supreme Court of Tennessee, which rendered its opinion on November 16, 1992. All State remedies have been exhausted.

V. ARGUMENT IN FAVOR OF GRANTING A WRIT OF CERTIORARI

Rule 10(a), Supreme Court Rules, states that this Court will consider granting a writ of certiorari when a

conflict of opinion exists among the United States Courts of Appeals on an important matter; if an unacceptable and unusual departure in the course of judicial proceedings has occurred; or when the exercise of this Court's supervisory powers is required. *See generally Braxton v. U.S.*, 500 U.S. 344, 347 (1991); *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 807-808 (1988); *Peyton v. Rowe*, 391 U.S. 54, 57-58 (1968). Moreover, the Court has long accepted cases when "the judgment and opinion below might seriously hinder future administration of the law. . . . " *Federal Trade Commission v. American Tobacco Co.*, 274 U.S. 543, 544 (1927). All of these factors are present in the Petitioner's case.

The law applicable to petitions for writs of habeas corpus arising from interstate detainers and the procedures necessary to vindicate these statutory rights constitute a continuing saga of confusion and dispute concerning the proper distribution of federal habeas jurisdiction in such cases. Clarification of the scope of federal jurisdiction in cases arising under the IAD and of the fair and just procedures for the disposition of such habeas claims, including transfers, would both prevent further repetition of the frustrating outcome of cases like the Petitioner's and promote the efficient administration of justice. More than a simple conflict in the decisions of Courts of Appeals exists in regard to claims of persons in the position of the Petitioner; rather, a fundamental pandemonium among federal courts endures in a bedlam of reasoning and results. While the decision of the Sixth Circuit in this case simply causes unnecessary delay in the administration of justice, it is merely one example of the bewildering state of habeas law in this area.

No matter how the facts are diced, this case involves clear violations not only of the IAD, which, with the exception of the Tennessee trial court that applied the manifestly clear requirements of the applicable law, have never been effectively vindicated according to its unambiguous terms, but also violations of the Petitioner's constitutional rights to a speedy and fair trial. In this Petition

for a Writ of Certiorari, presenting two interrelated issues, the Petitioner contends not only that federal courts have complete authority and jurisdiction to fashion appropriate habeas relief in interstate cases arising under the IAD but that this is an appropriate case for habeas relief. The Petitioner thus requests that this Court grant a Writ of Certiorari for a plenary review the Order of the Sixth Circuit i. this case. Should this Court grant this Petition, the Petitioner reserves the opportunity to argue the issues presented in his appeal to the Sixth Circuit in full at that time.

A. A Federal District Court either in the District of a Petitioner's confinement or of the custodian's presence has concurrent jurisdiction to issue a writ of habeas corpus arising from a detainer filed by a demanding State outside the territorial boundaries of the District Court but, in the appropriate cases, a District Court should transfer such petitions to a federal court in the demanding State in the interests of justice.

The power of a federal court to issue writs of habeas corpus is found in several statutes. *See* 28 U.S.C. §§ 2241-2255. In this case, the Petitioner relied on 28 U.S.C. §§ 2241 and 2254. In addition, the Petitioner invoked the procedure to provide notice to Tennessee authorities as provided by 28 U.S.C. § 2252.

More specifically, subject matter jurisdiction lies in this case under 28 U.S.C. §§ 2241(c)(3) as well as 2254(a). Under 28 U.S.C. § 2241(c)(3), writs of habeas corpus may be granted to any person "in custody in violation of the Constitution or laws or treaties of the United States," and under 28 U.S.C. § 2254(a), such writs may be issued "on the ground that [the petitioner] is in custody in violation of the Constitution or laws or treaties of the United States" as a result of the judgment of a State's courts. Furthermore, 28 U.S.C. § 2243 provides that a habeas writ is to "be directed to the person having custody of the

person detained" and authorizes a court to "dispose of the matter as law and justice require."

Subject matter jurisdiction for the availability of habeas relief based on violations of the IAD is now well-settled after this Court's decision in *Reed v. Farley*, 114 S.Ct. 2291 (1994), which recognized that "habeas review is available to check violations of federal laws," *id.*, at 2297. *See also United States v. Mauro*, 436 U.S. 340 (1978); *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973). Furthermore, the IAD is a federal law sanctioned by the Compact Clause of the United States Constitution (Article I, § 10, cl. 3) and is thus a law of the United States for habeas purposes. In *Carchman v. Nash*, 437 U.S. 716 (1985), the Supreme Court held that the IAD is an interstate compact subject to uniform federal construction. *Id.*, at 719. *See also Reed v. Farley*, 114 S.Ct. at 2297.

In *Reed v. Farley, supra*, the Supreme Court did not hold that violations of the IAD were not cognizable for habeas relief. Instead, the Court held

> "that a state court's failure to observe the . . . IAD . . . is not cognizable [for habeas relief] when the defendant registered no objection to the trial date at the time it was set, and suffered no prejudice attributable to the delayed commencement."

Id., at 2294. In the Petitioner's case, the Petitioner has alleged and it is undisputed that he objected to the violations of the IAD and consistently asserted his speedy trial rights at every stage; moreover, he has alleged and is prepared to demonstrate prejudice as a result of the delay in his case. Consequently, if a case has the kind of aggravating circumstances attendant to prejudice that justify habeas relief, it is not precluded in IAD cases. *Id.*, at 2298. The Court then expressly reserved any decision on the exact issue presented by the present case, *id.*, at 2300.[4]

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[4] Despite a rather extended line of Supreme Court cases approving federal habeas jurisdiction in the appropriate cases,

These more recent Supreme Court decisions concerning the scope of habeas relief essentially emphasized that both a nonwaiver and prejudice are requisite to awarding habeas relief. The Petitioner has repeatedly alleged both that he has been prejudiced by the conduct of the State in this case and that he has consistently asserted his statutory and constitutional rights to a speedy trial in a timely manner. The length of time that has passed without the opportunity for a speedy trial is so long at this point that prejudice is presumed under Supreme Court precedent. *E.g., Doggett v. United States,* 112 S.Ct. 2686, 2691 (1992).

Ignoring other allegations of prejudice relating to the IAD violations during Petitioner's State and federal custody,[5] in the context of the denial of the constitutional right to a speedy trial that also is presented by this petition, which claim was never addressed by the District Court at any point, as a result of the delay from October, 1987, the Petitioner lost crucial evidence for his defense, particularly documentary evidence, some of which has been destroyed. Appendix at pp. 12a-13a. Such circumstances are exactly the kinds of prejudice that have permitted habeas relief in numerous cases decided by the Supreme Court and Circuit Courts of Appeal.

At the time that the petition for habeas relief was filed, the Petitioner was incarcerated in the federal facility at Lexington, Kentucky, to which he had been

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the federal circuits remain divided on the exercise of jurisdiction in IAD cases. *E.g.*, finding jurisdiction, *King v. Brown*, 8 F.3d 1403 (9th Cir. 1993); *Casper v. Ryan*, 822 F.2d 1283 (3d Cir. 1987); against, *Cross v. Cunningham*, 87 F.3d 586 (1st Cir. 1996); *Reilly v. Warden, FCI Petersburg*, 947 F.2d 43 (2d Cir. 1991). The Sixth Circuit has come down on both sides of the issue in cases such as *Stroble v. Anderson*, 587 F.2d 830 (6th Cir. 1978) (for), and *Browning v. Foltz*, 837 F.2d 276 (6th Cir. 1988) (against).

[5] In the present circumstances, as will be discussed more thoroughly in the following subsection of this Petition, facing an unnecessary trial is itself a cognizable form of prejudice for habeas purposes.

transferred pursuant to his having made bond in the State of Tennessee. The Respondent held the Petitioner as an agent for the State of Tennessee and was the Petitioner's immediate custodian. Under Article II of the IAD, the United States was acting as a "Sending State" and the State of Tennessee was the "Receiving State." 18 U.S.C., Appendix 2, § 2, Article II. Both the United States and the State of Tennessee were and are parties to the IAD. When the Petitioner filed his petition for a writ of habeas corpus, he named his immediate custodian as the Respondent and in the course of the proceedings requested that the District Court notify the State of Tennessee as provided by 28 U.S.C. § 2252. The petition was filed in the Eastern District of Kentucky where both his immediate custodian was located and where he was then currently confined.

In *Braden v. 30th Judicial Circuit Court of Kentucky, supra,* 410 U.S. 484, this Court addressed a similar circumstance in which an Alabama prisoner filed for a writ of habeas corpus in the Western District of Kentucky where the petitioner was under an untried indictment. Noting that sharp conflicts existed in the decisions of federal courts as to the choice of forum for attacks on interstate detainers by federal habeas corpus, *Id.*, at 488, the Court readily concluded that federal jurisdiction existed for such attacks and recognized that pretrial relief in a criminal case can be appropriate. *Id.*, at 489-490. In a footnote, the Court observed that the Alabama warden acted as the agent of Kentucky in holding the prisoner on the detainer and that the prisoner was thus in custody within the meaning of the habeas statutes. *Id.*, at 489, n. 4. Furthermore, in holding that 28 U.S.C. § 2241(a) required no more than that the Court issuing a writ have jurisdiction over a custodian, *id.*, at 496, the Court expressly emphasized that "[n]othing in this opinion should be ~~taken~~ to preclude the exercise of **concurrent habeas corpus jurisdiction over the petitioner's claim by a federal district court in the district of confinement.**" *Id.*, at 499, n. 15

(emphasis added). The Court rejected "a slavish application" of the habeas statutes to avoid "an inflexible jurisdictional rule, dictating the choice of an inconvenient forum. . . . " *Id.*, at 499-500. The Order of the Sixth Circuit entered in this case effectively undermines *Braden* and reestablishes an inflexible jurisdictional rule.

Since *Braden*, the existence of concurrent habeas jurisdiction has inconsistently been recognized by lower federal courts and the proper procedures for challenging interstate detainers remain at best confusing. The law has always been that habeas jurisdiction exists in the district of confinement but more fundamentally jurisdiction certainly exists when a court can exercise power over the immediate custodian. *E.g., Ex Parte Hayes*, 414 U.S. 1327, 1328 (1973). Regardless, this Court has readily extended the jurisdictional conceptualization of the proper custodian when appropriate to the case. *Strait v. Laird*, 406 U.S. 341, 344-346 (1972).

This Court's decision in *Wade v. Mayo*, 334 U.S. 672 (1948), is clear that rigid adherence to futile procedural roadblocks to habeas jurisdiction is inconsistent with good judicial administration and that the habeas procedure is itself extremely flexible. *Id.*, at 681. Consistently, in *Ex Parte Endo*, 323 U.S. 283 (1944), the Court concluded that simple removal of a petitioner from the territorial jurisdiction of a district court with personal jurisdiction over a custodian at the time of the filing of the habeas petition did not deprive the district court of jurisdiction. *Id.*, at 304-307.

In *Nelson v. George*, 399 U.S. 224 (1970), this Court permitted a California prisoner to attack a North Carolina detainer in a District Court in California. Remarking that federal prisoners covered under 28 U.S.C. § 2255 did not face the jurisdictional problems encountered by State prisoners attempting to attack interstate detainers under 28 U.S.C. § 2241, the Court recognized that sound judicial administration would support the exercise of such jurisdiction by a District Court in another State, *id.*, at 228, n. 5, and concluded that a California federal court would be

permitted to exercise habeas jurisdiction in such cases so long as the petitioner had exhausted his State remedies. *Id.*, at 229-230. Likewise, in *Carbo v. United States*, 364 U.S. 611 (1961), this Court determined that the effective administration of criminal justice under 28 U.S.C. § 2241 supported the exercise of jurisdiction by a federal court in one State over habeas petitions arising out of the actions of another State without regard to the territorial jurisdiction of that federal court; however, the Court stated that historically some writs of habeas corpus could only be issued in the district of confinement and that jurisdiction always exists in such a district. *Id.*, at 612-619.

The requirement that the federal court have personal jurisdiction over the custodian as well as territorial jurisdiction over the habeas petitioner's place of confinement is often traced to this Court's decision in *Ahrens v. Clark*, 335 U.S. 188 (1948). *Braden*, however, severely limited the application of *Ahrens* and it now stands for an extremely narrow proposition. Regardless, to the extent that *Ahrens* remains viable, it supports the Petitioner's contention that he properly filed his habeas petition in the place where both his immediate custodian and his confinement were located.

In no decision of the United States Supreme Court discovered by the Petitioner has this Court expressly or implicitly held that a district court with jurisdiction over the present custodian of a habeas petitioner could not issue a writ of habeas corpus under the circumstances of this case and fashion such relief as would be appropriate under the law, including the dismissal of a pending indictment, which will be more fully discussed in Section V.B of this Petition. On the contrary, the reported decisions of this Court strongly support the proposition that concurrent jurisdiction for granting habeas relief exists in either the district of confinement or the place in which a custodian is found. Nothing in the habeas statutes implies that, if a habeas action is otherwise within the

jurisdiction of the District Court, the scope of relief available is somehow limited by the place in which the court sits. *Cf. Schlanger v. Seamans*, 401 U.S. 487, 489-492 (1971).

Nevertheless, some federal courts seem to distinguish between habeas petitions attacking detainers based on the custodian named as a respondent. *E.g., Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 894-895 (9th Cir. 1996); *Norris v. State of Georgia*, 522 F.2d 1006, 1009-1013 (4th Cir. 1975). The Petitioner contends that the scope of relief under the habeas statutes does not depend upon the custodian named in the petition or on the place in which the court sits. This construction of the habeas statutes is consistent with a reading of the habeas statutes as a whole as well as with the purposes of the writ and is supported by 28 U.S.C. § 2252, which provides that, to satisfy comity and federalism,

> "[p]rior to the hearing of a habeas corpus proceeding in behalf of a person in custody of State officers or by virtue of State laws notice shall be served on the attorney general or other appropriate officer of such State as the justice or judge at the time of issuing the writ shall direct."

While he specifically relied on this provision in the District Court, which failed to act on it, the Petitioner could find no reported cases construing this section of the habeas statutes but, logically, given the existence of concurrent jurisdiction as recognized in *Braden*, this statute is intended to protect the interests of a State in precisely the circumstances of this case. *See Baker v. Wade*, 743 F.2d 236, 242, n. 31 (5th Cir. 1984) (habeas statutes contemplate notice to State representatives, citing without elaboration § 2252). *Cf. Reimnitz v. State's Attorney of Cook County*, 761 F.2d 405, 409 (7th Cir. 1985) (suggesting notice to true custodian when immediate custodian has no interest in opposing habeas relief); *Trigg v. Moseley*, 433 F.2d 364, 365-367 (10th Cir. 1970) (foreign State prosecutor permitted to intervene in federal habeas proceedings to defend an interstate detainer). Regardless, in cases in which relief from a detainer entails dismissal of an indictment

under the IAD, if notice to the State under 28 U.S.C. § 2252 is deemed inappropriate for reasons of forum non conveniens, then, as will be more fully discussed below, a court should transfer the habeas petition pursuant to 28 U.S.C. §§ 1404(a) and 1631. If subject matter jurisdiction is otherwise established, as in the present case, dismissal is clearly inappropriate as a routine matter. While the foregoing cases appear to provide ample precedent for the exercise of concurrent jurisdiction in cases such as that of Petitioner, lower courts have been unable to apply this rule consistently or fairly. Confusion as to the proper party to be named as custodian is reflected in the decisions of the federal Courts of Appeals, despite the long established rule that habeas jurisdiction could be exercised whenever a court had personal jurisdiction over the immediate custodian. *See Bell v. United States*, 48 F.3d 1042, 1043-1044 (8th Cir. 1995). *See also Subias v. Meese*, 835 F.2d 1288 (9th Cir. 1987). Jurisdiction can also exist, however, whenever a court has jurisdiction over either the prisoner or the custodian. *Brittingham v. United States*, 982 F.2d 378, 379 (9th Cir. 1992).

Typically, under 28 U.S.C. § 2242, a petition for habeas corpus names as the respondent the warden of the penal facility in which a petitioner is presently incarcerated. *E.g., Stanley v. California Supreme Court*, 21 F.3d 359, 360 (9th Cir. 1994). If the present custodian is not named, the District Court in which the case is brought lacks personal jurisdiction. *Id.* A case involving a detainer lodged against a federal prisoner, however, creates a paradoxical circumstance in which the prisoner is being detained by his immediate federal custodian on behalf of and as an agent for a demanding State. When the State filing the detainer is outside the territorial jurisdiction of the federal court having jurisdiction over the immediate custodian, the jurisdictional problem is compounded. The problem of who is the immediate or ultimate custodian of a habeas petitioner is thus particularly difficult when a habeas petitioner is held in one State in immediate confinement and another State is seeking detention of the

same prisoner by use of a detainer. *Cf. Birdwell v. Skeen*, 983 F.2d 1332, 1334, n. 1 (5th Cir. 1993) (substitution of proper respondent permitted to sustain habeas jurisdiction). For example, in *Hogan v. State of Iowa*, 952 F.2d 224 (8th Cir. 1991), a Nevada prisoner filed a habeas petition in an Iowa federal court to attack an Iowa State conviction and the Court held that because neither the petitioner nor his Nevada custodian was within the State of Iowa an Iowa federal court lacked in personam jurisdiction. *Id.*, at 225.

Despite *Braden's* clear holding that concurrent jurisdiction exists to attack a detainer in either the State of confinement or in the State in which the custodian is found, if different, in *Dunne v. Henman*, 875 F.2d 244 (9th Cir. 1989), a federal inmate in Illinois filed a petition for habeas corpus to attack a detainer in a Washington (State) federal court, naming as the respondent his federal warden, but the Ninth Circuit construed *Braden* to require that the petitioner determine his true custodian, finding that jurisdiction was lacking because the petitioner failed to name the proper respondent within the territorial jurisdiction of the Washington federal court. *Id.*, at 248-249. Similarly, in *Birdsell v. State of Alabama*, 834 F.2d 920 (11th Cir. 1987), a federal inmate incarcerated in Oklahoma attempted to attack the legality of Alabama convictions in Alabama and the Court of Appeals affirmed the dismissal of the habeas petition for lack of jurisdiction. *Id.*, at 921-922. *See also Hajduk v. United States*, 764 F.2d 795, 796 (11th Cir. 1985). In *Ortiz-Sandoval v. Gomez*, 81 F.3d 891 (9th Cir. 1996), the Ninth Circuit, despite recognizing that habeas petitions may be heard either in the place in which the petitioner is incarcerated or where his immediate custodian is located, *id.*, at 895, the Court nevertheless required that a State official be named as a respondent to establish personal jurisdiction, regardless of the flexibility of the habeas provisions which contemplate a variety of possible respondents or even multiple respondents. *Id.*, at 894. On the other hand, in *Gibson v. Klevenhagen*, 777 F.2d 1056 (5th Cir. 1985), a Florida State prisoner filed

a habeas petition in a Texas federal court to attack a detainer and obtain dismissal of a Texas indictment as required by the IAD. *Id.*, at 1057-1058. The Court of Appeals relied on *Braden* in determining that a federal court has jurisdiction to provide such relief. *Id.*, at 1058.

Although courts often cite *Braden* and recite its holding that a court may issue a writ of habeas corpus when it has jurisdiction over either the prisoner or the custodian, many of these same courts then limit jurisdiction to the place of confinement. *E.g., United States v. Giddings*, 740 F.2d 770, 772 (9th Cir. 1984); *Blau v. United States*, 566 F.2d 526, 527 (5th Cir. 1978). The Fifth Circuit in *Sammons v. Rodgers*, 785 F.2d 1343 (5th Cir. 1986), discussed the peculiarities of jurisdiction in habeas cases arising from the use of foreign State convictions, recognizing that *Braden* clearly permitted such petitions to be brought in either the State of current confinement or the State of the foreign conviction but noting that in some cases jurisdiction apparently may lie in only one district. *Id.*, at 1345. Under long established law, however, jurisdiction would always exist where the petitioner was confined. *Id.*

In *United States v. Scott*, 803 F.2d 1095 (10th Cir. 1986), the Court of Appeals limited jurisdiction in claims brought under 28 U.S.C. § 2241 to the federal district in which the prisoner was confined. *Id.*, at 1096. Likewise, in *Hassain v. Johnson*, 790 F.2d 1420 (9th Cir. 1986), jurisdiction was limited to the district in which the petitioner was confined. *See also United States ex rel. Van Scoten v. Commonwealth of Pennsylvania*, 404 F.2d 767 (3d Cir. 1968).

Decided after *Braden*, in *Norris v. State of Georgia*, 522 F.2d 1006 (4th Cir. 1975), a North Carolina prisoner sought a writ of habeas corpus from a federal court in the State of his detention to challenge detainers lodged by the States of Georgia and Louisiana. The petition named the warden of the North Carolina prison, other North Carolina officials and the States of North Carolina, Georgia, and Louisiana. *Id.*, at 1008. Without reference to 28 U.S.C. § 2252, notice was provided to representatives of the foreign States. *Id.*, at 1009. Distinguishing between the

effect of the detainer and the remedy for illegally lodging or maintaining a detainer, the Court recognized that a court in the place of confinement had jurisdiction to entertain a habeas petition arising from a foreign detainer but limited the available relief to removing the effects of the detainer. *Id.*, at 1010. The Court distinguished Braden without addressing its holding concerning the existence of concurrent jurisdiction and found that no personal jurisdiction existed in the district of confinement that would allow such a court to enforce its judgment in a foreign jurisdiction. *Id.* The Court rejected the theory that the warden of the prison was acting as a agent for the purpose of establishing in personam jurisdiction. *Id.*, at 1011. A lengthy discussion concerning limitation on the scope of relief available in such situations was undertaken by the Court. *Id.*, at 1011-1013. Despite Braden. the Court concluded that federal district courts in the demanding States were the only places in which complete relief could be obtained. *Id.*, at 1013. In partial dissent, Judge Winter contended that the warden was the agent of the demanding States and that under *Braden*, jurisdiction existed in North Carolina to provide complete relief from the detainers. *Id.*, at 1014-1019. *See also Wingo v. Ciccone*, 507 F.2d 354, 355-357 (8th Cir. 1974); *Grant v. Hogan*, 505 F.2d 1220, 1222-1225 (3d Cir. 1974); *McEachern v. Henderson*, 485 F.2d 694, 695-696 (5th Cir. 1973). *Cf. Galaviz-Medina v. Wooten*, 27 F.3d 487, 493-494 (10th Cir. 1994).

In contrast to these foregoing cases, in *Thompson v. Missouri Bd. of Parole*, 929 F.2d 396 (8th Cir. 1991), a federal prisoner located in Minnesota filed a habeas petition in the State of his confinement. The Court recognized that habeas is the proper method for challenging a State detainer and, despite the fact that the Missouri Board of Parole was not located in Minnesota, held that venue lay in the State of his immediate custodian (Minnesota). *Id.*, at 398. Similarly, in *Parette v. Lockhart*, 927 F.2d 366 (8th Cir. 1991), a federal prisoner in Arkansas was permitted to attack a Louisiana detainer in the State of his confinement, relying on *Braden*. *Id.* The Fifth Circuit in *Solsona v.*

Warden, F.C.I., 821 F.2d 1129 (5th Cir. 1987), held that habeas petitions under 28 U.S.C. § 2241 may be filed in any court with jurisdiction over the prisoner or his custodian. *Id.*, at 1132. The District Court in which the Petitioner filed in the case *sub judice* had jurisdiction over both the Petitioner and his immediate custodian, who was acting as an agent for the State of Tennessee at the time the Petition was filed.

Concurrent jurisdiction on the basis of this agency theory was upheld in *Fest v. Bartee*, 804 F.2d 559 (9th Cir. 1986), in a case involving the Interstate Corrections Compact, when a State prisoner serving a Nebraska sentence in a Nevada State prison filed a habeas petition in a Nevada federal court. The Court concluded that jurisdiction was proper in the State of incarceration where the immediate custodian was found on the basis that such custodian was acting as a agent for Nebraska. *Id.*, at 560. In *Dillworth v. Barker*, 465 F.2d 1338 (5th Cir. 1972), another pre-*Braden* decision which arose under the Uniform Act for Out-of-State Parolee Supervision, the interstate compact between South Dakota and Florida created an agency relationship sufficient for jurisdiction to attach but the Court concluded that disposition for reasons of forum non conveniens would be appropriate, although expressing concern that the petitioner could be subject to jurisdictional problems in States in which he was not confined. *Id.*, at 1340-1341.

The confused state of the law regarding habeas jurisdiction in interstate detainer cases existing prior to *Braden* is reflected in *Reed v. Henderson*, 463 F.2d 485 (5th Cir. 1972). *See also Jackson v. State of Louisiana*, 452 F.2d 451, 453-454 (5th Cir. 1971) (jurisdictional difficulties in habeas detainer cases discussed); *United States ex rel. Meadows v. State of New York*, 426 F.2d 1176, 1179-1183 (2d Cir. 1970) (characterizing the uncertain state of the law of jurisdiction); *Brown v. State of Arkansas*, 426 F.2d 677, 677-680 (8th Cir. 1970). Jurisdiction of a Kansas federal court over a Virginia State detainer was approved by the Tenth Circuit in *Campbell v. Commonwealth of Virginia*, 453 F.2d 1230

(10th Cir. 1972). *See also Bedwell v. Harris,* 451 F.2d 122, 122 (10th Cir. 1971). The Tenth Circuit, however, has limited jurisdiction to the removal of the effects of the detainer but required the petitioner to seek other relief in the demanding State. *Trigg v. Moseley, supra,* 433 F.2d at 366. In *Shelton v. Meier,* 485 F.2d 1177 (9th Cir. 1973), decided shortly after *Braden* a federal prisoner in Washington State filed a habeas petition to attack a California State conviction and the Court limited *Braden* to situations in which concurrent jurisdiction would exist only if a present effect of the conviction on the petitioner existed in both jurisdictions. *Id.,* at 1178.

In a pre-*Braden* decision, the Sixth Circuit itself did not permit a prisoner confined in a Kansas federal prison to file a habeas petition in a Tennessee federal court to challenge a Tennessee detainer. *White v. State of Tennessee,* 447 F.2d 1354, 1354-1355 (6th Cir. 1971). Logically, according to Sixth Circuit law, either such a petitioner must file in the place of his confinement or nowhere but, ironically, the Sixth Circuit's decision in the present case limits the Petitioner to filing a habeas petition only in Tennessee where the ultimate custodian is apparently found but where the Petitioner was not held in immediate custody at the time the petition was filed.

While *Braden* would appear to have resolved this jurisdictional tension, clearly the confusion existing in the law prior to this Court's decision in *Braden* continues to haunt the subsequent decisions of the federal courts. The morass described in *Word v. State of North Carolina,* 406 F.2d 352 (4th Cir. 1969), entangled in distinctions concerning the scope of available relief depending upon the custodian named, is equally representative of the contemporaneous state of the law, which is thoroughly discussed in *Chatman-Bey v. Thornburgh,* 864 F.2d 804, 810-814 (D.C. Cir. 1988).

Moreover, after *Braden,* transfer rather than dismissal would be the preferred disposition of habeas claims arising from interstate detainers as it would encourage judicial efficiency and serve the interests of justice. *Braden,*

supra, 410 U.S. at 499, n. 15. Further, transfer would serve the purposes of habeas corpus consistent with its flexible nature. This Court expressly disapproved of the very "perpetual game of jurisdictional pingpong" in *Christianson v. Colt Industries Operation Corp., supra*, 486 U.S. at 818, to which the Petitioner has been relegated by the Sixth Circuit's decision in this case. *Cf. Marks v. Rees*, 715 F.2d 372, 373-375 (7th Cir. 1983) (retransferring habeas case). Transfer is favored under federal law. *See Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 465-467 (1962). Moreover, transfer would avoid any potential problems arising from abuse of the writ. *Cf. Wingo v. Ciccone*, 507 F.2d at 357, n. 9. Transfer of habeas cases is the usual practice. *Denjanjuk v. Meese*, 784 F.2d 1114, 1115 (D.C. Cir. 1986) Failure to consider whether a transfer is appropriate under either 28 U.S.C. §§ 1404 or 1631 constitutes an abuse of discretion. *Miller v. Hambrick*, 905 F.2d 259, 262 (9th Cir. 1990) (transfer particularly appropriate when petitioner has otherwise demonstrated jurisdiction). *See also Chatman-Bev v. Thornburgh, supra*, 864 F.2d at 814, n. 10. *But see Anderson v. United States*, 898 F.2d 751, 752-753 (9th Cir. 1990) (transfer not mandatory).

In *Parette v. Lockhart*, 927 F.2d 366 (8th Cir. 1991), although the Court of Appeals concluded that jurisdiction existed in an Arkansas federal court to determine the validity of a Louisiana detainer, the Court noted that a transfer on grounds of forum non conveniens would not be inappropriate. *Id.*, at 366 (citing *Braden*). *See also In re Tripati*, 836 F.2d 1406, 1407 (D.C. Cir. 1988); *Wren v. Carlson*, 506 F.2d 131, 134 (D.C. Cir. 1974).

Clearly because subject matter jurisdiction existed in this case and it involved a claim arising from violations of the IAD, the Court of Appeals and the District Court both had the obligation to notify the proper custodian pursuant to 28 U.S.C. § 2252 and to transfer this case, if necessary, in the interests of justice.

B. A Petition for a Writ of Habeas Corpus is not moot when the Petitioner is released from custody if the nature of the relief sought is not affected and is appropriate under the circumstances of the case.

In its Order, the Sixth Circuit concluded that the Petitioner's case was rendered moot when the Respondent released the Petitioner from custody without surrendering the Petitioner to Tennessee authorities. Ignoring this incomplete and inadequate statement of the relevant facts, the Sixth Circuit's conclusion is nevertheless entirely contrary to the law and constitutes a radical departure from established habeas procedures. Although mootness can arise at any stage of litigation, *Calderon v. Moore*, 116 S.Ct. 2066, 2067 (1996), as long as a court can grant " 'many effectual relief whatever' " to the party then a case cannot be considered moot. *Id.* (citations omitted). *See also Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992); *Peyton v. Rowe*, 391 U.S. 54, 66-67 (1968); *Pollard v. United States*, 352 U.S. 354, 358 (1957).

This Court has repeatedly held that simple release from custody, unless unconditional, will not of itself necessarily deprive a court of habeas jurisdiction. In *Board of Pardons v. Allen*, 482 U.S. 369, 371, n. 1 (1987), the case was not mooted by release because the relief sought extended beyond simple release from custody. *See also Levy v. Parker*, 396 U.S. 1204, 1205 (1969). Likewise, in *Lane v. Williams*, 455 U.S. 624 (1982), mootness attached only because no further detention or restraint was possible under the facts of the case and the prisoners faced no other collateral consequences. *Id.*, at 630-634. *See also Eagles v. United States*, 329 U.S. 304, 306-307 (1946). In the case *sub judice*, the Petitioner is currently under indictment and enlarged on bond and thus is under present restraints on his liberty. *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 300 (1984); *Gilliam v. Foster*, 75 F.3d 881, 885, n. 1 (4th Cir. 1996).

In habeas cases, the existence of custody at the time that the petition is filed is sufficient to establish jurisdiction and subsequent release will not invariably render habeas claims moot. *See Gosa v. Mayden*, 413 U.S. 665, 670, n. 1 (1973); *Jones v. Cunningham*, 371 U.S. 236, 238 and 240-241 (1963); *Barry v. Bergen County Probation Dept.*, 128 F.3d 152, 159 (3d Cir. 1997); *Rutledge v. Sunderland*, 671 F.2d 377, 379 (10th Cir. 1982). As this Court recognized in *Hensley v. Municipal Court, San Jose Milpitas J. D. Cal.*, 411 U.S. 345 (1973), the concept of custody in habeas cases is broad and flexible. *Id.*, at 351-353. Conditional release from prison does not justify disposition of a habeas petition on grounds of mootness but may make necessary affording a petitioner an opportunity for the substitution of another named custodian. *Humphrey v. Cady*, 405 U.S. 504, 506, n. 2 (1972). *Cf. Guerra v. Meese*, 786 F.2d 414, 416-417 (D.C. Cir. 1986).

Mootness and custody are distinct concepts in habeas cases. Since jurisdiction existed when the habeas petition was filed and relief may presently be granted, the Petitioner's release cannot render the case moot. *Carafas v. Lavallee*, 391 U.S. 234, 236-239 (1968); *Escobedo v. Estelle*, 655 F.2d 613, 614-615 (5th Cir. 1981). *Cf. Maleng v. Cook* 490 U.S. 488, 490-492 (1989); *Ex Parte Endo, supra*, 323 U.S. at 305-306; *Mathis v. Hood*, 851 F.2d 612, 614 (2d Cir. 1988) (appeal not moot when unconditional release is sought). This Court's decision in *Carafas v. Lavallee, supra*, 391 U.S. at 237-240, rejected the very niggardly reading of the habeas statutes implicitly contained in the Sixth Circuit's Order. Under 28 U.S.C. § 2243, a habeas petition is to be disposed of "as law and justice require" and as long as the court may award some relief to a habeas petitioner the case cannot be considered moot.

Presently pending against the Petitioner in the State of Tennessee is a ten year old untried indictment on which the detainer filed in this case was premised. This indictment remains subject to dismissal. *Lane v. Williams*, 455 U.S. 624, 634 (1982). The Petitioner has presented the precise issues raised by this petition to the courts of the

State of Tennessee and the highest court of that State has denied relief to the Petitioner. *Preiser v. Rodriguez*, 93 S.Ct. 1827, 1830 (1973). The Petitioner has exhausted available State remedies and is subject to custody under the court order of a State as a result of a detainer lodged pursuant to the IAD. Consequently, what is essential for habeas relief is the illegality of custody, *id.*, at 1833, not the nature or timing of the order or authority on which custody is predicated; thus, anticipatory applications to prevent trials on invalid indictments or to prevent future illegal confinement are legitimate uses of the writ. *Id.*, at 1834-1835.

Consistent with *Preiser* and *Braden*, in a number of Circuit Court cases applications for writs of habeas corpus have been approved in anticipation of a State trial. As the Court of Appeals stated in *United States v. Toole*, 65 F.3d 381, 383 (4th Cir. 1995) (citation omitted),

> "[t]he purpose of habeas corpus is to test the legality of detention. . . . Pretrial petitions for habeas corpus 'are properly brought under 28 U.S.C. § 2241, which applies to persons in custody regardless of whether final judgment has been rendered and regardless of the present status of the case pending against him.' "

See also, e.g., Cavallaro v. Wyrick, 701 F.2d 1273, 1274-1275 (8th Cir. 1983) (characterizing the wording of the IAD as strong and violations as nontechnical in granting pretrial habeas relief for IAD violation under § 2241); *Gilstrap v. Godwin*, 517 F.2d 52, 53 (4th Cir. 1975) (pretrial application for habeas relief not premature when based on the invalidity of a detainer). More particularly,

> "an allegation of a state prisoner, that he has been denied rights under the [IAD], is an allegation that he is in custody in violation of a law of the United States, and the requirement for federal habeas corpus jurisdiction under 28 U.S.C. § 2254(a) is met."

Echevarria v. Bell, 579 F.2d 1022, 1025 (7th Cir. 1978). Respondent's repeated contentions below, accepted by

the Sixth Circuit, as to the lack of jurisdiction in this case because the Petitioner has not yet been tried on the pending State charges completely misapprehends, if not intentionally ignores, the nature of the violation involved in this case: the Petitioner should not be tried at all because the IAD requires that the indictment be dismissed. Obviously, as recognized by the applicable habeas statutes, the very point of obtaining habeas relief in this case at this juncture is to prevent a trial that should never occur. Clearly, further delay would be highly prejudicial and the available legal remedy would be wholly inadequate in this case. Thus the Petitioner needs immediate and prospective habeas relief.

In this case, the Petitioner seeks to enforce the sole statutory remedy of the IAD, which is dismissal of an indictment, as well as to vindicate his constitutional speedy trial rights. *See* 18 U.S.C., Appendix 2, § 2, Articles III(d) and IV(e). *See also Gibson v. Klevenhagen, supra,* 777 F.2d at 1058; *Kane v. State of Virginia,* 419 F.2d 1369, 1372-1373 (4th Cir. 1970). The nature of the remedy sought by the Petitioner was and is not limited to removal of the effects of the detainer during his federal incarceration. Since the Petitioner continues to be under the very indictment challenged in this proceeding and is currently under bond as a result of that indictment, his release could not have affected the remedy appropriate under prevailing law. The Sixth Circuit's reliance on *Burrus v. Turnbo,* 743 F.2d 693 (9th Cir. 1984), and its procedural progeny, is unexplained and unelaborated, particularly since the remedy sought by the petitioner in *Burrus* related only to the conduct of his federal custodian, *id.*, at 699, rather than to relief from an indictment. Certainly when a federal prisoner is released and his claim related solely to the conduct of his federal custodian, then mootness may well result but such is not the case presented by the Petitioner. *See Escobedo v. Estelle,* 655 F.2d 613, 614-617 (5th Cir. 1981). Clearly, the Petitioner is both in custody for the purposes of the habeas statutes and the Court can grant relief from such custody.

See Harrison v. State of Indiana, 597 F.2d 115, 117-118 (7th Cir. 1979); *Commonwealth of Pennsylvania v. Merlo*, 364 A.2d 391, 395 (Pa. 1976).

Obviously, but contrary to the Sixth Circuit's Order, the existence of a pending indictment constitutes the kind of custody for which habeas relief is available in the proper cases. *E.g., Sunal v. Large*, 332 U.S. 174, 179-180 (1947). This relief is expressly contemplated by the habeas statutes. In *Braden, supra*, this Court itself approved habeas relief prior to trial in an interstate detainer case. 410 U.S. at 489-492. Pretrial habeas relief may be exceptional but it is not dependent on whether an indictment carries the civil disabilities of a conviction, as stated by the Sixth Circuit in its Order, but rather when pretrial relief is available, it is to remedy a present impairment of liberty. *See Jones v. Perkins*, 245 U.S. 390 (1918); *Ex Parte Royall*, 117 U.S. 241 and 254 (1886). As this Court stated in *Price v. Johnston*, 334 U.S. 266, 283 (1948),

> "the principle has developed that the writ of *habeas corpus* should be left sufficiently elastic so that a court may, in the exercise of its proper jurisdiction, deal effectively with any and all forms of illegal restraint. The rigidity which is appropriate to ordinary jurisdictional doctrine has not been applied to this writ."

When federal law expressly authorizes a federal court to interfere with State proceedings, 28 U.S.C. § 2283, as in the present case under 28 U.S.C. §§ 2241(c)(3) and 2251, then no barrier exists for the exercise of federal jurisdiction prior to a State criminal trial. *See Gilliam v. Foster*, 61 F.3d 1070, 1083, n. 11 (4th Cir. 1995). Some situations, however rarely occurring, require pretrial intervention to address a serious deprivation of liberty for which no other remedy exists. *See Wooley v. Maynard*, 430 U.S. 705, 710-712 (1977); *Mitchum v. Foster*, 407 U.S. 225, 228-230, 234-235 (1972) (specifically citing habeas proceedings as authority for interfering with a State criminal trial); *Calderon v. Moore, supra*, 116 S.Ct. at 2067 (availability of pretrial relief prevented mootness). *See*

also Mannes v. Gillespie, 967 F.2d 1310, 1312 (9th Cir. 1992); *Neville v. Cavanagh*, 611 F.2d 673, 675-676 (7th Cir. 1979); *United States ex rel. Parish v. Elrod*, 589 F.2d 327, 328 (7th Cir. 1979). Manifestly, federal law is clear that an indictment can be a sufficient basis for habeas relief. *E.g., Irvin v. Dowd*, 366 U.S. 717, 728-729 (1961).

So long as a petitioner has exhausted the available State remedies, as is the case *sub judice*, then federal courts are permitted to release State prisoners prior to trial. *Tooten v. Shevin*, 493 F.2d 173, 175 (5th Cir. 1974); *United States ex rel. Scranton v. State of New York*, 532 F.2d 292, 294 (2d Cir. 1976). In this case, certainly no point exists in further litigating the issue in a State court, as the Petitioner would be bound by the law of the case, and because the Petitioner should not be tried at all as a result of the violations of his statutory and constitutional rights, dismissal of the indictment is the only appropriate remedy. *See Trainor v. Hernandez*, 431 U.S. 434, 440-442 (1977). None of the policy reasons for restraint from interference with a State criminal proceeding apply in this case. *Fay v. Noia*, 372 U.S. 391, 398-399 (1963). The question is not the existence of federal authority to dismiss an indictment, as the Sixth Circuit held in this case, but whether federal habeas power should be exercised under the circumstances of this case. *Id.*, at 418, 430-431. *See also Frisbie v. Collins*, 342 U.S. 519, 520-521 (1952).

The primary purpose of the IAD is to protect prisoners, *Cuyler v. Adams*, 449 U.S. 433, 449-450 (1981), but in the present case the IAD has been construed and applied in a manner that both is inconsistent with the remedial purposes of the statute and has resulted in the very mischief the IAD was designed to prevent. The Petitioner's allegations are undisputed that he has attempted to obtain the protection and remedies of the IAD from the time that he first learned of the charges against him in October, 1987. In addition, the Petitioner has since October, 1987, attempted to obtain a speedy trial on the pending indictment. Until his release from federal custody, a

decade after the initiation of the State charges, the Petitioner was subject to a detainer that was several years old and, as of the date of this Petition, he has still never had a trial on the State charges pending against him. Evidence crucial to his defense has now been permanently lost due to the delay. His rehabilitation was interrupted; federal parole was denied to him.

The State of Tennessee has the duty to provide the Petitioner with both a speedy and a fair trial. *Barker v. Wingo*, 407 U.S. 514, 527-529 (1972); *Smith v. Hooey*, 393 U.S. 374, 383 (1969). The requirement that a habeas petitioner show prejudice has been satisfied on the present allegations of the petition, as amended. Fundamental defects that inherently result in a miscarriage of justice are presented by this petition. In the face of repeated demands by the Petitioner, the State of Tennessee has ignored or excused the exacting requirements of the IAD, defeating the remedial purposes of the statute and depriving the Petitioner of a liberty interest in its procedures and remedies. As in *Braden* all the Petitioner asks is that the State conform to its legal duty. 410 U.S. at 491-492. As the Supreme Court itself recognized in *Reed v. Farley*, 114 S.Ct. at 2297,

> "[w]e have stated that habeas review is available to check violations of federal laws when the error qualifies as 'a fundamental defect which inherently results in a complete miscarriage of justice, [or] an omission inconsistent with the rudimentary demands of fair procedure. . . .' The IAD's purpose – providing a nationally uniform means of transferring prisoners between jurisdictions – can be effectuated only by nationally uniform interpretation. . . . Therefore, the argument that the compact would be undermined if a State's courts resisted steadfast enforcement, with total insulation from [habeas] review, is not without force."

(Citations omitted.) While *Reed* did not present a case in which a timely demand for a speedy trial under the IAD

had been made, *id.*, the Petitioner's case presents precisely the case reserved by the Supreme Court's decision in *Reed*, *id.*, at 2300.

Since the presumption of prejudice due to delay increases with time, *Doggett v. United States*, 112 S.Ct. at 2691, and an eight year delay is extraordinary, *id.*, the Petitioner's speedy trial claim is obviously cognizable for habeas purposes. The very concerns addressed in *Doggett*, *id.*, at 2692-2693, are present in this case. As recognized by the Magistrate Judge in his Report and Recommendation, from October, 1987, the Petitioner has consistently asserted his constitutional and statutory rights to a speedy trial on the State charges involved in this case. *Cf. Smith v. Hooey, supra*, 393 U.S. 374 (federal prisoner subject to interstate detainer denied speedy trial). As it presently stands, the Petitioner has been denied a trial on the present charges for almost a decade. This crucial fact is uncontested. Yet on such egregious facts, the government has also persistently contended and the Sixth Circuit as well as other federal circuits have concluded that the federal courts have no jurisdiction to grant habeas relief in this case.

VI. CONCLUSION

Given the anarchical state of the law concerning the proper exercise of jurisdiction in habeas cases arising from interstate detainers, further guidance by this Court is obviously required. The Petitioner thus requests that this Court grant his Petition for a Writ of Certiorari for a plenary review of the proceedings in this case.

Respectfully submitted,

DOUGLAS A. TRANT, #6871
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(423) 525-7980

APPENDIX

No. 97-6154

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THOMAS J. DILLON, Petitioner-Appellant, v. ARTHUR BEELER, Warden, FMC, Lexington, Respondent-Appellee.	)	ORDER (Filed Mar. 24, 1998)

Before: KEITH, SUHRHEINRICH, and DAUGHTREY, Circuit Judges.

Thomas J. Dillon, through counsel, appeals a district court order denying his petition for a writ of habeas corpus. 28 U.S.C. § 2241. Dillon filed his action against a federal warden to challenge the validity of a State of Tennessee detainer placed against Dillon. The warden has moved to dismiss the appeal as moot because the warden granted Dillon his release from the federal prison without turning him over to Tennessee authorities. The warden argues that this release moots the appeal. *See Burrus v. Turnbo*, 743 F.2d 693 (9th Cir. 1984), *vacated with instructions to dismiss as moot, Hijar v. Burrus*, 474 U.S. 1016 (1985) (as explained in *State v. Burrus*, 729 P.2d 935, 936 (Ariz. 1986)). The warden's argument is well-taken.

Dillon argues that collateral consequences prevent the case from becoming moot. *See Carafas v. LaVallee*, 391

U.S. 234 (1968). However, the collateral consequences described in *Carafas* flow from a felony conviction. Dillon is challenging an indictment, and an indictment does not carry the civil disabilities that a felony conviction creates.

Dillon also argues that a federal court does possess the power to dismiss an indictment when a state violates the Interstate Agreement on Detainers. *See Stroble v. Anderson*, 587 F.2d 830 (6th Cir. 1978). In *Stroble*, unlike in the present case, the state (Michigan) which issued the detainer was before the court as the respondent. Therefore, the court could issue an appropriate writ. In Dillon's case, the state is not before the court, and the court lacks the jurisdiction necessary to issue a writ. *See Oritz-Sandoval v. Gomez*, 81 F.3d 891, 894-96 (9th Cir. 1996).

The motion to dismiss the appeal as moot is granted.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, jr.
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 96-110

THOMAS J. DILLON, PETITIONER,

V.

ARTHUR BEELER, RESPONDENT.

OPINION AND ORDER

(Filed Aug. 29, 1997)

The petitioner, Thomas J. Dillon, a federal prisoner previously incarcerated at FCI-Jessup, Georgia, and currently incarcerated at FMC-Lexington, filed a petition for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2241. He seeks to have pending Tennessee state charges for murder dismissed based upon the alleged violations of the Interstate Agreement on Detainers ("IAD"). 18 U.S.C. App. § 2. Consistent with local practice, this matter was referred to the United States Magistrate Judge for development of the record.

The Magistrate Judge filed a Report and Recommendation on June 17, 1997. In her report, the Magistrate Judge found that in fact Tennessee did not begin Dillon's trial within 120 days of Dillon's arrival in Tennessee. However, the Magistrate Judge concluded that because Dillon signed a clear and sweeping waiver surrendering his rights under the IAD, Dillon cannot state a claim for relief for IAD violations. Accordingly, the Magistrate Judge recommended that this Court dismiss Dillon's petition with prejudice.

Dillon filed objections to the Report and Recommendation on June 17, 1997. This Court must make a *de novo*

determination of those portions of the Magistrate Judge's Report and Recommendation to which objection is made. 28 U.S.C. § 636(b)(1)(C). Dillon argues that it is not clear that prisoners can waive their IAD rights. Further, Dillon contends that, despite the clear language of the waiver, he did not intend to waive all of his IAD rights, but rather just those pertaining to the anti-shuttling provision of Article IV of the IAD. The Court finds Dillon's arguments meritless.

The Court, having examined the record and having made a *de novo* determination, is in agreement with the Magistrate Judge's finding that Dillon waived his rights under the IAD by signing a full waiver of the same, and as such, that his petition alleging violations thereof must be dismissed.

Accordingly, the Court hereby ORDERS:

(1) the objections of the petitioner, Thomas J. Dillon, to the Magistrate Judge's Report and Recommendation [docket entry 27] ARE OVERRULED;

(2) the Magistrate Judge's Report and Recommendation [docket entry 26] IS ADOPTED as and for the opinion of the Court; and

(3) a Judgment will be entered contemporaneously with this Opinion and Order in favor of the respondent, Arthur Beeler, Warden FMC-Lexington.

This 29th day of August, 1997.

/s/ Karl S. Forester
KARL S. FORESTER, JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 96-110

THOMAS J. DILLON, PETITIONER,

V.

ARTHUR BEELER, RESPONDENT.

JUDGMENT

(Filed Aug. 29, 1997)

In accordance with the Opinion and Order entered contemporaneously with this Judgment, the Court hereby ORDERS AND ADJUDGES:

(1) the petition for a writ of *habeas corpus* is DISMISSED WITH PREJUDICE, and judgment is entered in favor of the respondent, Arthur Beeler.

(2) pursuant to 28 U.S.C. § 2253, a certificate of probable cause to appeal shall issue as to the following questions: Whether Thomas J. Dillon waived his right to assert a claim for a violation of the Interstate Agreement on Detainers; and if not, whether the Tennessee state murder charges against Dillon must be dismissed for Tennessee's failure to bring Dillon to trial within 120 days of Dillon's presence in Tennessee.

(3) under the Prison Litigation and Reform Act, Public Law 104-134, a prisoner, unless destitute, must pay fees and costs for all civil litigation, including appeals, on an installment basis. Specifically, the district court must

assess, and when funds exist, collect, an initial partial filing fee of twenty percent of the greater of:

(A) the average monthly deposits to the prisoner's account, or

(B) the average monthly balance in the prisoner's account for the prior six month period.

Thereafter, prisoners are required to make monthly payments of 20 percent of the preceding month's income. The agency having custody of the prisoners must forward payments from their accounts to the clerk of the court each time the amount in the accounts exceeds $10 until the filing fees are paid.

Should Dillon desire to proceed without prepayment of fees, NO LATER THAN TEN DAYS AFTER THE ENTRY OF THIS ORDER Dillon shall FILE an application to proceed without prepayment of fees and affidavit, which includes a certificate signed and dated by an authorized officer of the institution of incarceration setting out:

(i) the average monthly deposits to Dillon's account, and

(ii) the average monthly balance in Dillon's account for the prior six month period.

Upon receipt of Dillon's application, the Court will make the appropriate determination regarding the initial partial filing fee pursuant to the Prison Litigation and Reform Act;

(4) this judgment is final and appealable, and no just cause for delay exists; and

(5) this matter IS STRICKEN from the active docket.

This 29th day of August, 1997.

/s/ Karl S. Forester
KARL S. FORESTER, JUDGE

No. 97-6154

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THOMAS J. DILLON, Petitioner-Appellant, v. ARTHUR BEELER, Warden, FMC, Lexington, Respondent-Appellee.	)	ORDER (Filed Apr. 27, 1998)

BEFORE: KEITH, SUHRHEINRICH, and DAUGHTREY, Circuit Judges.

Thomas J. Dillon, through counsel, petitions for rehearing of this court's order dismissing as moot his habeas corpus petition. 28 U.S.C. § 2241. Counsel notes that Judge Daughtrey, in her former position as justice of the Tennessee Supreme Court, ruled upon the validity of the indictment which underlies this case. Dillon argues that it was, therefore, inappropriate for Judge Daughtrey to sit on the panel.

Under 28 U.S.C. § 455(a), a judge is required to recuse herself if the judge's impartiality might reasonably be questioned. Opinions held by judges as a result of what they learned in earlier proceedings are not bias [sic] or prejudice requiring recusal unless the judge demonstrates a deep-seated antagonism toward the party. *Liteky v. United States*, 510 U.S. 540, 551, 554-55 (1994). Here the Tennessee Supreme Court's decision, written by Justice Drowota and concurred in by Judge Daughtrey, does not

display any deep-seated antagonism toward Dillon. Counsel's argument lacks merit.

The petition for rehearing is denied.

ENTERED BY ORDER OF
THE COURT

/s/ Leonard Green
Clerk

IN THE CRIMINAL COURT, DIVISION II
FOR KNOX COUNTY, TENNESSEE

STATE OF TENNESSEE	)	
VS.	)	No. 37597
	)	
THOMAS DILLON	)	
Defendant	)	

ORDER

The defendant has filed a Motion under Tennessee Code Annotated 40-31-101, Article IV (c) that the indictment be dismissed for failure of the State to cause the trial to be commenced within 120 days of the arrival of the prisoner in the receiving state. The State insists that this period was properly tolled by the Stay Order entered. The defendant counters that this Order was not entered in compliance with the Interstate Compact in that it was not entered in open Court, the prisoner or his counsel being present.

The Court has reviewed the applicable statutes, the case law and the testimony as well as the entire file and finds as follows:

1. The Stay Order was not entered for good cause in open Court in compliance with the Interstate Compact for Detainers.

2. The Order failed to toll the running of the 120 day period.

Therefore, the indictment is DISMISSED with prejudice and the defendant ordered returned to Federal custody.

The Clerk will forward copies of this Order to the defendant, the attorney for the defendant, the District Attorney General and the State Attorney General and Reporter.

Enter this 17th day of May, 1991.

/s/ Ray L. Jenkins
RAY L. JENKINS, JUDGE
SIXTH JUDICIAL CIRCUIT
DIVISION II

CERTIFIED TRUE COPY
MARTHA PHILLIPS, CLERK
CRIMINAL COURT
KNOX COUNTY, TN
By /s/ Jewel Davis
DEPUTY CLERK

[LOGO] **U.S. Department of Justice**

Federal Bureau of Investigation

Washington, D. C. 20535

DEC 10 1992

Robert E. Wilson, Esq.
Wilson and Kochheiser Company, LPA
132 South Main Street
Marion, Ohio 43302

Re: Thomas Jerome Dillon
FOIPA No. 341,713 190-34865

Dear Mr. Wilson:

This is in reference to my letters dated October 31, 1991, and June 10, 1992, concerning your Freedom of Information-Privacy Act requested on behalf of your client, Thomas Jerome Dillon.

You were advised that your request to the Tampa Office of the FBI was being handled separately. The Tampa file concerning the RICO – Murder investigation was reviewed for documents which were not reported to the primary investigative office or to Headquarters. The file contained one page in addition to material processed and released to you by letter dated October 31, 1991. However, that page is being withheld pursuant to Title 5, United States Code, Section 552, subsections (b)(7)(C) and (b)(7)(D) and Section 552a, subsection (j)(2), an explanation of which is enclosed.

A search of the indices in the Tampa Office also revealed a file which corresponded to the Narcotics file released with my letter of June 10, 1992. Efforts by personnel of the Tampa Office to retrieve that file, however,

were unsuccessful because the file was inadvertently destroyed.

Cincinnati was the office of primary responsibility in both of the above investigations. Since you have received the files maintained by the Cincinnati Office, you may be assured that you have received the substantive information documented by this agency. Experience has shown that additional information or documents is minimal in offices other than the primary investigative office and FBI Headquarters. As you were previously advised, files maintained by Headquarters concerning these matters are duplicative of those maintained by Cincinnati. Therefore, the processing of your client's request is now completed.

If you desire, you may appeal any denials contained herein. Appeals should be directed in writing to the Assistant Attorney General, Office of Legal Policy (Attention: Office of Information and Privacy), United States Department of Justice, Washington, D. C. 20530, within thirty days from receipt of this letter. The envelope and the letter should be clearly marked "Freedom of Information Appeal" or "Information Appeal." Please cite the FOIPA number assigned to your request so that it may be easily identified.

Sincerely yours,

/s/ J. Kevin O'Brien/BSO
J. Kevin O'Brien, Chief
Freedom of Information -
Privacy Acts Section
Information Management
Division

Enclosure

EXPLANATION OF EXEMPTIONS

SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552

(b)(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(b)(2) related solely to the internal personnel rules and practices of an agency;

(b)(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(b)(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(b)(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(b)(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(b)(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or

an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life of physical safety of any individual;

(b)(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(b)(9) geological and geophysical information and data, including maps, concerning wells.

SUBSECTIONS OF TITLE 5, UNITED STATES CODE, SECTION 552a

(d)(5) information compiled in reasonable anticipation of a civil action proceeding;

(j)(2) material reporting investigative efforts pertaining to the enforcement of criminal law including efforts to prevent, control, or reduce crime or apprehend criminals, except records of arrest;

(k)(1) information which is currently and properly classified pursuant to Executive Order 12356 in the interest of the national defense or foreign policy, for example, information involving intelligence sources or methods;

(k)(2) investigatory material compiled for law enforcement purposes, other than criminal, which did not result in loss of a right, benefit or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence;

(k)(3) material maintained in connection with providing protective services to the President of the United States or any other individual pursuant to the authority of Title 18, United States Code, Section 3056;

(k)(4) required by statute to be maintained and used solely as statistical records;

(k)(5) investigatory material compiled solely for the purpose of determining suitability eligibility, or qualifications for Federal civilian employment or for access to classified information, the disclosure of which would reveal the identity of the person who furnished information pursuant to a promise that his identity would be held in confidence;

(k)(6) testing or examination material used to determine individual qualifications for appointment or promotion in Federal Government service the release of which would compromise the testing or examination process;

(k)(7) material used to determine potential for promotion in the armed services, the disclosure of which

would reveal the identity of the person who furnished the material pursuant to a promise that his identity would be held in confidence.

IN THE CRIMINAL COURT OF
TENNESSEE AT KNOXVILLE

THE SIXTH JUDICIAL DISTRICT

STATE OF TENNESSEE	)	
	)	
VS.	)	CASE NO. 37597
THOMAS DILLON,	)	
ALIAS	)	

TRANSCRIPT

THE HONORABLE RAY L. JENKINS,
PRESIDING JUDGE

APPEARANCES

FOR THE STATE:

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Knoxville, Tennessee 37902

FOR THE DEFENDANT:

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[p. 1] IN THE CRIMINAL COURT OF
KNOX COUNTY, TENNESSEE

DIVISION II

STATE OF TENNESSEE	)	
VS.	)	
	)	CASE NO. 37597
THOMAS DILLON,	)	
ALIAS	)	

(This cause came on to be heard and was heard on the 2nd day of May, 1991, before the Honorable Ray L. Jenkins, Judge, holding the Criminal Court for Knox County, at Knoxville, Tennessee, when the following proceedings were had:)

MR. TRANT: May it please the Court, we're here today on a motion to dismiss the indictment and return the defendant to federal custody.

Of course, the Court, I'm sure, has had an opportunity to review the motion, but, essentially, what it states is that the defendant was returned – or was sent to Tennessee and brought into custody here on December 11th of last year pursuant to a detainer placed under the Interstate Compact on Detainers, TCA 40-31-101 et. seq.

That his first trial date, of course, was set on February 11th, 1991, and continued at the request of the State of Tennessee until April 1st of '91. We had before that demanded a speedy trial, as the Court may remember, vigorously objected to the continuance in that – on that [p. 2] date.

Further, after that, the defendant continued to demand his right to a speedy trial, has never moved for any continuance in this cause and never has agreed to any continuance of this cause.

That on March 6, 1991, at the request of the State of Tennessee, this case – the trial of this case was stayed pending interlocutory appeal by the State of Tennessee to the Court of Criminal Appeals on the defendant's successful motion to suppress a search.

Your Honor please, we contend further that no hearing in open court was ever held on the State's motion to stay the proceedings. Certainly the statutes requires, and the language is rather clear in Article IV(c), that the trial shall be commenced within 120 days of the arrival of the prisoner in the receiving state, but for good cause shown

in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

Clearly we are outside the 120 days from December 11th. No question about that. And clearly there is no proceeding in open court on which the continuance was granted or the stay ordered.

We had previously filed, and I would ask the Court to take notice, the arrest warrant in this cause showing [p. 3] that it was executed on December 11th and would ask the Court to take notice of its own records indicating the dates that I have previously stated.

Initially, your Honor, we would submit to the Court – if I may approach the bench? –

THE COURT: Yes. Thank you.

MR. TRANT: – a case by the name of *Stroble vs. Anderson*. This is a Sixth Circuit case arising out of the District Court in Michigan wherein the Court held at several times – and I would direct the Court primarily to page 839, headnote three, which says that "the district judge correctly recognized the term 'open court' meant with a judge on the bench."

This case repeatedly refers to that, that – and there were continuances granted in the *Stroble* case where there was no hearing in open court with a judge on the bench. And the Sixth Circuit, Judge Edwards, chief judge found that that was a violation of the compact on detainers and that the case should therefore be dismissed with prejudice, since that is the only remedy allowed for under the compact.

Further, a discussion in that case, which I think is important, is that the defendant is not required to show any prejudice whatsoever under the compact.

The terms of the compact are strict, are [p. 4] mandatory. And, of course, the reason for them is that for so many years, as the Court knows, we had problems with one state placing a detainer on a prisoner in another state or in federal jurisdiction, and it caused them all kinds of difficulties. A detainer placed on a prisoner has an effect on his security status, his parole status, his rehabilitation status, and that's why the congress of the United States and the State of Tennessee, as well as the other states in the nation have entered into this compact.

This is a procedural argument that we're making, but a very important procedural argument.

I would also note that, unlike in *Stroble* where there were two states involved, in this case we have a federal prisoner who is received into custody in the courts of Tennessee, making *Stroble* even more important authority, since it is a Sixth Circuit case.

Judge Edwards quotes Justice Felix Frankfurter in this case and says that "the history of American freedom is in no small measure the history of procedure."

And the procedure is important in this matter, because it – the legislative purpose of it is to give the defendant an opportunity to be heard on any motion for a continuance and to have a record subject to review. And certainly that wasn't the case in this case. There is no record at all of the State's motion. The only record that [p. 5] we have is the order, of course, signed by the Court,

which I assume was brought to the Court by the State. I can – I think I can tell by the printing on the stay order that it was submitted to the Court by the State. No question about that.

I would further note, if you look through *Stroble*, that repeatedly it talks about the importance – the mandatory nature of the language of the act. Of course, the act is the same for all parties, so we're not talking about any language. And it repeatedly says that these actions must be taken in open court, and, if not, the court shall enter an order dismissing the same indictment with prejudice.

Your Honor please, I would also cite to the Court a case that's talked about a good bit in *Stroble*, and that's the United States Supreme Court case – and I have a copy, if I may approach the bench? – United States vs. John Mauro and John Fusco.

THE COURT: All right.

MR. TRANT: Your Honor, that was a seven-two decision of the United States Supreme Court, and it's still good law.

And in that case, the United States Supreme Court talks throughout the opinion about the mandatory nature of the compact and that how Article IV(c), which is what we're talking about, says that if you don't try a prisoner within [p. 6] 120 days, the case is to be dismissed, the indictment, with prejudice.

Justice White, in writing that opinion, talks about the very important procedures in this case and how they shall be followed and shall be followed in a mandatory fashion.

I would also cite to the Court, your Honor please – if I may approach the bench? – as persuasive authority in this cause another United States Court of Appeals case, this time from the Second Circuit, and that is *United States vs. Ford.*

If I could direct the Court to page 743 of that opinion, specifically headnote fifteen, it says: "Not only were there delays unjustified, but two of the three were not granted in 'open court, the defendant or his counsel being present.' " And they go on to dismiss that indictment saying that the compact was not followed, that the formal requirements of the compact were not followed. And that indictment was dismissed in the *Ford* case.

If I may approach the bench again, your Honor please?

THE COURT: Yes.

MR. TRANT: I would also cite as persuasive authority in this case the case of *Johnson vs. Stagner,* United States Court of Appeals case in the Ninth Circuit, [p. 7] and would direct the Court's attention to page 763 of that opinion, specifically at headnote five.

And the second sentence says: "We cannot tell whether the continuance was granted following a proceeding in open court or, if so, whether Johnson or his counsel were attending the proceeding." Then it says: "These statutory requirements cannot be ignored." It then goes on to cite *Ford,* which I've given the Court; *Mauro,* which I've given the Court; and *Stroble,* which I've given to the Court, again, stressing the mandatory nature of the proceedings and the requirements under the detainer.

Your Honor please, I would next cite as – as somewhat relevant, I think – I've tried to look for other places in our laws in Tennessee where the phrase "open court" is used, and certainly there is one statute where that is employed. I have a copy of it, if I may approach the bench?

THE COURT: Yes.

MR. TRANT: If the Court please, that's the statute beginning at TCA 40-14-301 et. seq. which requires that every word spoken in open court must be taken verbatim by a court reporter, and directs the Court, of course, to instruct the court reporter to do so.

If I could, TCA 40-14-307, it says: "A designated reporter shall attend every stage of each criminal case [p. 8] before the Court and shall record verbatim by a method prescribed or approved by the Executive Secretary all proceedings had in open court and such other proceedings as the judge may direct."

Well, of course, we have no verbatim taken by the court reporter of any matter preceding this stay, because it wasn't in open court. And I know this Court doesn't hold anything in open court without that court reporter there taking it down, following that statute, further showing that it wasn't in open court.

Lastly, as far as authority, your Honor please – if I may approach the bench?

THE COURT: Yes.

MR. TRANT: And this is an interpretation of that statute I just talked about, talking about open court, and that's the case from our own Court of Criminal

Appeals, cert denied by the Supreme Court, of *Layman vs. State*.

And I would direct the Court to page 3033 of that opinion at headnote eight, and it says that "we call attention to TCA 40-2035, our predecessor to the new statute, providing that the reporter shall record verbatim all proceedings had in open court." And they say that's true even if you hire your own court reporter.

"The need for a record of what occurs during sentencing" – this was a sentencing case – "is evident. [p. 9] Properly conducting the proceeding in the first place, plus an accurate record to prove it, is by far the best defense against collateral impeachment."

As our own Court of Criminal Appeals has recognized, that if you're going to have a matter in open court, that the court reporter shall take down what is – what is stated.

Essentially, your Honor please – again, the history of the detainer compact is clear. That if a state is going to demand that they try somebody, that they're going to have to follow very strict procedures. And that if they don't follow the procedures, then the case is to be dismissed with prejudice; the reason for that being that we're just not going to leave people lying around on detainers or bring them up to a state and leave them lying around, but that we're going to follow the compact as it's written. And the courts have been very strict in interpreting it for that reason.

In every case before your Honor where an individual has had a case continued beyond 120 days, as is the case

in the instant cause, if it hasn't strictly followed the procedure, then that case is to be dismissed.

In *Stroble* they didn't follow the procedure in open court. I might also mention that cert was applied for in that case with the United States Supreme Court and was [p. 10] denied.

But that's exactly the same kind of situation we have here. The judge – you did enter a stay – and I'm not insinuating in any way that the Court did anything wrong. It's up to the State of Tennessee to make sure they follow the procedure. The Court did what was before it, and the Court has remained entirely neutral throughout this case.

But the State of Tennessee – it's incumbent upon them – and *Strobe* and *Mauro* talks about that. Justice White in *Mauro* talks about that. That it's incumbent upon the prosecutors to make sure they follow the procedure; and if they don't, if they don't follow any part of it, then the case is to be dismissed. The reason for that is to make sure that the procedure is followed. That's the reason that the remedies are that severe, and to make sure the prisoner is not unduly detained by the detainer action or by any action taken by the receiving state, and that's exactly what's happened in this cause.

We have demanded a speedy trial throughout the proceedings, have never agreed to any continuance.

Of course, I knew the State was attempting to obtain a stay, and I told them, and I told your Honor I think, that if I were them, I – I don't blame them. I would too, under the circumstances. But then it was incumbent upon them

to make sure that they obtained it, if they could, [p. 11] following the exact procedures set out in the compact.

That's what they didn't do, and for those reasons, we would ask the Court to dismiss this indictment as set out in the act and to order the defendant to be returned to federal custody.

THE COURT: General?

MR. JOLLEY: Your Honor, we would call Mrs. Meltabarger as a witness.

THE COURT: Pardon?

MR. JOLLEY: Mrs. Meltabarger.

STATE'S PROOF

SHEILA MELTABARGER was called and, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. JOLLEY:

Q Would you state your name, please.

A Sheila Meltabarger.

Q And who do you work for and in what capacity?

A I work for the Criminal Court Clerk's Office. I'm the minute clerk for Division II.

Q Okay. And were you present in the courtroom and operating in that capacity on April the 1st of 1991?

A I was.

Q Okay. And on that date, was the case that we are presently before the Court on, State of Tennessee vs. Thomas [p. 12] J. Dillon, set for trial?

A It was.

Q Okay. And was it on the Court's docket on that day?

A It was.

Q Did Mr. Trant show up in court on that day in open court?

A Not on that case he didn't.

Q Was a representative of the Attorney General's Office present in court?

A There is always someone here.

Q And on that date, did Judge Jenkins reaffirm that a stay had been issued on March the 6th of those proceedings?

A Yes, he did.

Q And that case was taken off of the docket on that day?

A Yes.

MR. JOLLEY: That would be all the questions we have of the witness.

THE COURT: Cross-examine?

CROSS-EXAMINATION

BY MR. TRANT:

Q The case that was set for trial on April 1st was Kenneth Bowles; was that – is that correct?

[p. 13] A Thomas Dillon was also set for trial.

Q Okay. Well, I – I know that, Sheila, but –

A Uh-huh.

Q – okay. The Dillon case had already been stayed, had it not?

A The order had already been put down, but it was still set for trial on that day.

Q Well, it – it had already been stayed pending action by the Court of Criminal Appeals in March. Is that what the Court's order reflects?

A Right.

Q And, of course, you're not saying that – that any discussion of the Dillon case in this courtroom was made in my presence, are you?

A I do not know if you were here or not. When all of the cases had been taken care of except for the Dillon case, I asked the judge, I said, Well, I assume this is to go in unset cases now, and he said yes.

Q Okay. But you're not saying I was present?

A Oh, no.

Q And certainly you're not saying Mr. Dillon was present?

A No.

Q Thank you.

MR. JOLLEY: That's all the questions we have of [p. 14] this witness, your Honor.

THE COURT: All right, all right.

(WITNESS EXCUSED)

* * *

MR. JOLLEY: Your Honor, the argument that Mr. Trant makes is that the Court has to specifically address all matters on continuance in open court. That is not what the statute says. The statute says for good cause shown in open court, the Court may grant a continuance.

In this case, the Court had an extensive hearing on February the 11th and the Court determined on that date that the evidence that the State had in this matter should be suppressed. The Court granted an appeal on that particular matter.

Your Honor, that was the good cause shown in open court in front of Mr. Dillon, in front of Mr. Trant.

As a result of that, the Court entered its order on March the 6th stating that good cause had been shown under the statute.

Furthermore, this case was again on the Court's docket in open court on April the 1st, at which time the Court reaffirmed the order. Now, the fact that Mr. Trant didn't choose to appear on that day can't be held against the State of Tennessee.

Mr. Trant cannot rely on a motion on March the [p. 15] 6th and then hold it against the State of Tennessee later on and say, Well, the State of Tennessee didn't comply with any hypertechnicalities.

Secondly, your Honor, we would refer the Court to the statute, 40-31-101, Section 6, part (A). That statute states: "In determining the duration and expiration dates of the time periods provided in Article III and Article IV of this agreement, the running of such time period shall be tolled whenever and for as long as the prisoner is unable to stand trial as determined by the court having jurisdiction of this matter."

The Court, based on its findings in open court on February the 11th of this year, made the determination that an appeal should be granted, that a stay should be granted, that a continuance was in order. That good cause had been shown in open court. And under that statement and under Article VI, Section (A), the time period is tolled.

Your Honor, we would ask the Court to dismiss the motion by Mr. Trant.

THE COURT: Let me ask this, General. Is a stay a continuance within the meaning of this statute?

MR. JOLLEY: Your Honor, the order of the Court on March the 6th states the following: "It is the further opinion that good cause has been shown for granting a reasonable and necessary continuance until such time as a [p. 16] determination has been made on the appeal."

Now, the appeal is the basis for all of this. The appeal was granted because of the Court's ruling on Mr. Trant's motion. Yes, sir. All of this stuff – basically, the Court said that based upon the granting of the appeal in this matter, that it is ordered that the time limitations set forth in the statute are stayed and suspended and this case continued pending a determination by the appellate courts.

THE COURT: Yes, sir.

MR. TRANT: May it please the Court, first of all, as to the February 11th date, there was no motion for a stay made by Mr. Jolley in open court that day, and certainly none granted in open court. So, that's completely irrelevant.

As to the April 1st date, there was no need for me to be here, of course, because the case had been stayed. And it's not incumbent upon me to make sure Mr. Jolley comes into court and follows the requirements of the statute. Those are his requirements, not mine. And he certainly can't place the burden on me; the burden is on Mr. Jolley to make sure that all the procedures are followed.

As to his argument under VI(A), your Honor please, that same argument came up in *Stroble*, and I would direct the Court's attention to page 838 of that opinion, the last [p. 17] full paragraph and the discussion preceding it.

And what Judge Edwards says in that case is that the State cannot rely upon a defendant being unable to stand trial because of the State's own actions. Unable to stand trial means that the defendant is physically or mentally

unable to stand trial or that he's not in the jurisdiction. If you look at these cases, that's what each of them holds.

And Judge Edwards goes on to say: "We believe that Article VI was written as a protective measure for a transferred prisoner. It cannot appropriately be turned from a shield for the defendant into a sword for the prosecution."

Exactly what Mr. Jolley is trying to do is turn this into a sword for the prosecution instead of a shield for the defendant.

The compact was written to act as a shield for unnecessary delays, unnecessary detainers, and that's exactly the purpose behind it, if your Honor please.

And, quite simply, again, they've not followed the requirements of the compact. There is no question today that there is no record of any proceeding where the State has moved in open court for a continuance or a stay of this cause nor has one been granted in open court, and for that reason, we ask that this case, again, be dismissed.

THE COURT: All right. I'll take this under [p. 18] advisement and given you a written opinion.

MR. TRANT: Thank you, your Honor.

(END OF REQUESTED TRANSCRIPT)

* * *

[p. 19] CERTIFICATE

I, the undersigned, Linda M. Miller, Official Court Reporter for the Sixth Judicial District of the State of Tennessee, do hereby certify that the foregoing is a true, accurate, and complete transcript, to the best of my knowledge and ability, of all the proceedings had and evidence introduced in the hearing of the captioned cause in the Criminal Court for Knox County, Tennessee, on the 2nd day of May, 1991.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

May 9th, 1991

/s/ Linda M. Miller
Official Court Reporter
State of Tennessee